1997

Charles Jacobsen v. Veda Dare and Rick Nebeker : Reply Brief of Appellants

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHARLES JACOBSEN as General Partner of Mobile Park West, a Utah General Partnership,	)	
Plaintiff and Appellee,	)	
vs.	)	Docket No. 970630-CA
VEDA DARE AND RICK NEBEKER,	)	Priority No. 15
Defendants and Appellants.	)	

REPLY BRIEF OF APPELLANTS VEDA DARE AND RICK NEBEKER

APPEAL FROM AN ORDER OF
THE THIRD JUDICIAL DISTRICT COURT, DIVISION II
OF SALT LAKE COUNTY, UTAH
HONORABLE SHEILA MCCLEVE
DATE OF ORDER:
Case No. 9600013522

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The trial court errored in granting plaintiff's motion for summary judgment. There is a material issue of fact as to whether defendants substantially complied with the 15-day Notice.

I. CORRECTION IN FACTS SECTION

Paragraph 2 and 7 of "Facts" section in appellants' brief should be corrected as follows (reflecting that the 15-day Notice was serviced on Veda Dare and Rick Nebeker on November 1, 1996 not October 29, 1996):

> 2. On November 1, 1996, All Seasons served Dare and Nebeker with a "Landlord's 15-day Notice" pursuant to Section 57-16-5, Utah Code Annotated 1953. (R. 14)
>
> 7. By November 22, 1996, 6 days after the 15-day Notice had run, Dare and Nebeker had not been able to complete painting of the shed. Dare and Nebeker had to wait until the weather was warm enough and dry enough to paint the shed. When the shed was painted, the rain streaked the shed and the shed had to be repainted. (R.193.)

II. THE MOBILE HOME PARK RESIDENCY ACT DOES NOT PREEMPT THE COMMON LAW DOCTRINE OF SUBSTANTIAL PERFORMANCE.

Plaintiff's sole argument that the doctrine of substantial performance does not apply to compliance with a 15-day Notice is Cresentwood Village, Inc. v. Johnson, 909 P.2d 1267 (Utah App. 1995). Plaintiff claims that in Cresentwood this Court held that the Utah Mobile Home Park Residency Act preempted the doctrine of doctrine of substantial performance as it applies to compliance with a landlord's "15-day Notice" issued pursuant to the Utah Mobile Home Park Residency Act. This is absolutely false.

In Cresentwood, this Court held that where a tenant complies

with a 15-day Notice, but thereafter repeatedly violates park rules, the park is not required to give further notice before bringing an action for eviction. In Cresentwood, the mobile home park served a 15-day Notice on a tenant which stated that "should [the tenant] in the future again violate the above rules or a different rule of the park, this will result in forfeiture of your lease and eviction without any further period of cure" Id. at 1269. The tenant complied with the 15-day Notice but thereafter continued to violate park rules. The plaintiff filed an action to terminate the lease based on the later violations without any further cure period. Defendant argued that, under common law, the mobile home park was required to give the tenant an additional notice, although not required by statute, of its intention to terminate the lease if there were further violations. The court held that because the Utah Mobile Home Park Residency Act did not require any additional notice to be given, no such notice was required.

Although Cresentwood did not directly address whether the doctrine of "substantial performance" applies to a 15-day Notice, indirectly the court acknowledged that it does. In describing the trial court's finding that the tenant had complied with the original 15-day Notice, the Cresentwood Court stated as follows:

> Eventually, on May 6, 1993, CVI served Johnson with a 15-day eviction notice for rule violations. That notice required Johnson to cure three violations if she were

> to avoid eviction. After receiving the notice, Johnson timely cured the unlicensed vehicle violation and the mobile home painting violation. Johnson also substantially cured the violation related to the keeping of her lot neat, clean and weed free, removing most, but not all the garbage and weeds.

Id. at 221. (Emphasis added.)

Thus, the court found that the 15-day Notice had been complied with, upon a finding that Johnson had removed "most, but not all, garbage and weeds" and "substantially cured" the violation.

There is no provision in the Utah Mobile Home Park Residency Act expressly preempting the doctrine of substantial performance as it applies to compliance with a 15-day Notice. Furthermore, the Utah Mobile Home Park Residency Act specifically provides that "the rights and remedies as granted by this chapter are cumulative and non-exclusive." Utah Code Annotated 57-16-11.

As more fully set forth in the Brief of Appellants (see pages 6-8), substantial performance is the law in the State of Utah, and should apply to compliance with a 15-day Notice. See also Appendix A hereto, which is Model Utah Jury Instruction 26.21 -- the substantial performance jury instruction approved for use in jury trials throughout the State of Utah.

III. THERE ARE MATERIAL ISSUES OF FACT WHICH PRECLUDE SUMMARY JUDGMENT

The trial court errored in granting summary judgment in this case inasmuch as there is a material issue of fact in dispute.

Because a jury could find that the defendants "substantially complied" with the 15-day Notice, the trial court errored in granting summary judgment.

Based on the facts in the record and the reasonable inferences that can be drawn therefrom, a jury could reasonably conclude as follows:

> 1. Prior to being served with the 15-day Notice on November 1, 1996, Rick Nebeker and Veda Dare had lived in the mobile home park for 18 months, were not late on rent and did not violate park rules.[1]
>
> 2. On November 1, 1996, defendants received a 15-day Notice and immediately and fully complied with five of the seven items.[2]
>
> 3. The remaining two items were to have the "shed painted" and to store items in the back yard and around the mobile home "in your shed or in your home."[3]
>
> 4. Upon receiving the 15-day Notice on November 1, 1996, and prior to the expiration of the 15 days, defendants took the following actions to comply with these two items:
>
> a. Purchased paint and paint rollers;[4]

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[1]Plaintiff has not alleged in the Complaint or in the "Statement of Undisputed Facts" in plaintiff's Motion for Summary Judgment any previous rule violations or failure to pay rent. (R. 1-3, 110-111.)

[2]See R. 188-190. Plaintiff has never alleged that these 5 items were not immediately and timely complied with. (R. 110-111.)

[3]See R. 15, items 1 and 3.

[4]Pictures E-5, E-8, E-9, and E-10 (R. 157-58) show the paint and paint roller. Veda Dare testified that "[w]e commenced [painting] shortly after the 15-day Notice was given, but because of the rain problem we were not able to complete it within the 15-days but we did complete shortly thereafter." (R. 186) See also R. 192-93 (Affidavit of Rick Nebeker).

b. Watched and waited until the weather was warm enough and dry enough to permit painting;[5]

c. Painted the shed, which was streaked by rain before it could dry;[6]

d. Watched and waited until weather permitted repainting;[7]

e. Moved 2 wicker chairs, one table, one umbrella, one wicker basket and one patio chair out of the back yard and indoors;[8]

g. Obtained permission from park manager to cover with a tarp certain items that would not fit in the shed or could not be taken indoors.[9]

5. On November 17, 1996, the day the 15-day Notice expired, defendants were still trying to repaint the shed in adverse weather. Once the shed was repainted, the remaining items in the yard were immediately stored in the shed and the remaining items were covered with a

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[5]See paragraph 5 of Veda Dare Affidavit (R. 186) and paragraph 2 of Rick Nebeker Affidavit (R. 192-93).

[6]Id. ("[W]hen it rained the rain would streak the shed and the shed would have to be repainted.")

[7]Id.

[8]In comparing Exhibit D-2 (R. 154), taken on October 2, 1996, with Exhibits E-4, E-5, E-6, E-8, E-9 and E-10 (R. 157-58), taken on November 22, 1996, 2 wicker chairs, one table, one umbrella, one wicker basket and one patio chair have been moved.

[9]Rule 9(c) of the All Seasons Mobile home Community Good Neighbor Policy provides that items can be stored in the back yard if "approved by owner." In this case, Rick Nebeker specifically asked for permission to store certain items in the back yard, covered by a tarp, and the manager consented. "Brenda Bottoms [the park manager] said that the items could be stacked by the house and back fence and covered, which they were." (R. 189, 194)

tarp, as per permission from the park manager.[10]

6. On or shortly after November 23, 1996, 7 days after the 15-day Notice expired, the repainting of the shed was completed, the remaining items were either stored inside or covered with a tarp (pursuant to permission from the park manager) and all items on the 15-day Notice were complied with.[11]

7. On December 6, 1996, the Complaint was filed.[12]

8. The February 21, 1997, pictures demonstrate that everything in the 15-day Notice had been complied with.[13]

9. The May 12, 1997, pictures were taken while defendants were spring-cleaning their shed and are irrelevant to anything in this case.[14]

Attached hereto as Appendix B is an integration of the foregoing with plaintiff's photographs, demonstrating how the photographs corroborate the foregoing.

Based on the foregoing, a jury could determine that defendants had "substantially complied" with the 15-day Notice.

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[10]See R. 192-93.

[11]Id.

[12]See R. 1.

[13]Exhibits E-4, E-5, E-6, E-8, E-9 and E-10 (R. 157-58) show that the remaining items in the yard have either been stored or covered with a tarp (as per agreement with park manager).

[14]Exhibits G-1, G-2 and G-3 were taken while defendants were spring cleaning the shed. "Brenda Bottoms apparently waited until we were in the process of spring cleaning the shed and then took these pictures. Roger Strader came over during the course of one or two days we had pulled everything out of the shed and then moved everything back into the shed while we were cleaning. There are pictures of the items that were in the shed when they were pulled out and we were cleaning the shed." Paragraph 13, Affidavit of Veda Dare. (R. 188.)

The jury could reason that the only breach was a short delay in complying with two items in the 15-day Notice -- the painting the shed and storing items in the shed. In evaluating the "facts and circumstances," the jury could find that defendants did "everything they could to comply" during the 15 days, had only been barred by weather from timely completing these two items, and therefore made a "good faith" effort to comply.[15] Furthermore, time was not "of the essence" and it was at plaintiff's request that the outdoor painting was to be done in November. The jury could conclude that the items were completed as soon as weather allowed and this delay was "minor." The jury could take into consideration the policy that the law does not favor forfeitures and will not forfeit a tenant's lease unless there has been a substantial breach. See Housing Authority of Salt Lake City vs. Delgado, 914 P.2d 1163, 1165 (Utah App. 1996). A jury could reasonably conclude that Rick Nebeker and Veda Dare "substantially complied" with the 15-day Notice. Because a jury could so conclude, granting summary judgment is error and should be reversed.

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[15]See Affidavit of Veda Dare, paragraph 5: "Since the 15-day Notice requested that we paint the shed we were doing everything we could to comply. When it rained the rain would streak the shed and the shed would have to be repainted. We commenced shortly after the 15-day Notice was given, but because of the rain problem we were not able to complete it within the 15-days but we did complete it shortly thereafter."

IV. PLAINTIFF HAS NOT ESTABLISHED PRIMA FACIE CASE.

In its Motion for Summary Judgment, plaintiff simply attaches the pictures, with no explanation of what the pictures mean, what they purport to represent, how they portray rule violations or any other explanation. Photographs do not "speak for themselves" and must be explained.[16]

V. RULE 404(b) PROHIBITS THE INTRODUCTION OF LATER PHOTOGRAPHS.

Pursuant to Rule 404(b) of the Utah Rules of Evidence, the photographs taken after the date the Complaint is filed cannot be used to establish a violation on the date the Complaint was filed. In this case, plaintiff has not introduced any evidence that there were any violations of the 15-day Notice on the date the Complaint was filed. (To the contrary, the next photographs taken after the date the Complaint was filed, on February 22, 1997, shows that there was full compliance with the 15-day Notice as of that date.)

VI. CONCLUSION

Substantial performance is law in the State of Utah. It applies in this case. Furthermore, there is a material issue of fact as to whether defendants substantially complied with the 15-day Notice. The trial court's granting of plaintiff's Motion for

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[16]Plaintiff's counsel tries to testify throughout the Brief of Appellee as to what the pictures represent. Testimony of counsel is not evidence. Brenda Bottoms' Affidavit only states that the photographs "show the rule violations complained of on the 15-day Notice." (R. 119) No further explanation is given.

Summary Judgment should be reversed and defendants awarded their attorney's fees.

DATED this 20 day of January, 1998.

Russell A. Cline
Attorney for Veda Dare
and Rick Nebeker

MAILING CERTIFICATE

This is to certify that on this 21 day of January, 1998, two (2) true and correct copies of the foregoing Appellants Brief were mailed first class, postage prepaid to:

James R. Boud
Troy Walker
Ashton, Braunberger & Boud
302 W. 5400 So., Suite 103
Murray, UT 84107

MUJI 26.21

SUBSTANTIAL PERFORMANCE

The plaintiff must prove that the plaintiff substantially performed the plaintiff's obligation to [describe required performance of the plaintiff and to whom performance was owed]. Proof of substantial performance means that the plaintiff must prove all of the following:

1. That the plaintiff performed substantially all of what the contract required.

2. That the plaintiff's performance was so nearly equivalent to what was bargained for that it would be unreasonable, based on all the facts and circumstances, to deny the plaintiff the payment of the contract price, less any damages for the plaintiff's failure to perform the remainder of the contract terms.

3. That the plaintiff acted in good faith, and did not intentionally fail to comply with the terms of the contract.

If you find that the plaintiff has proved all three of these items, then you must find that the plaintiff is entitled to recover the contract price from the defendant, less any amount owing to the defendant resulting from the plaintiff's failure to perform all of the plaintiff's obligations under the contract. If you find that the plaintiff has not proved all of these items, then you must find the plaintiff is not entitled to recover the agreed contract price from the defendant.

References:

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APPENDIX B

CHRONOLOGY AND EXPLANATION OF PHOTOGRAPHS[1]

1. October 2, 1996, photograph of defendants' backyard:

2. On November 1, 1996, defendants are served with a 15-day Notice.

3. By November 17, 1996, all items are completed except painting shed and storing items in backyard in shed (or covering certain items with a tarp, as per manager's consent). Because of rain streaking the paint and inclement weather, defendants have not been able to complete these items.

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[1]The citation to the record for the foregoing facts is fully developed on pages 6-8 of this brief. The Court is generally referred to the Affidavits of Veda Dare and Rick Nebeker (R. 185-194.

4. November 22, 1996, photograph of defendants' backyard.

   a. 6 days after the 15-day Notice expired, defendants *are still trying to complete repainting of the* shed - pictures show ladder, paint roller and paint.

   b. The pictures show recent rain.

   c. Note that the two wicker chairs, wicker basket, table, umbrella and chair shown in the October 2, 1996 picture have all been removed from the yard and stored.

   d. The only items remaining in the yard are those that will go in the shed when painting is complete or that will be covered by a tarp, as per the park manager's consent.

E8

E9

E10

5. Shortly after the foregoing pictures were taken (and prior to the filing of the Complaint), all remaining items in the 15-day Notice were completed, to wit the painting of the shed was completed, the remaining items in the yard were either covered with a tarp (as per agreement) or stored in the shed.

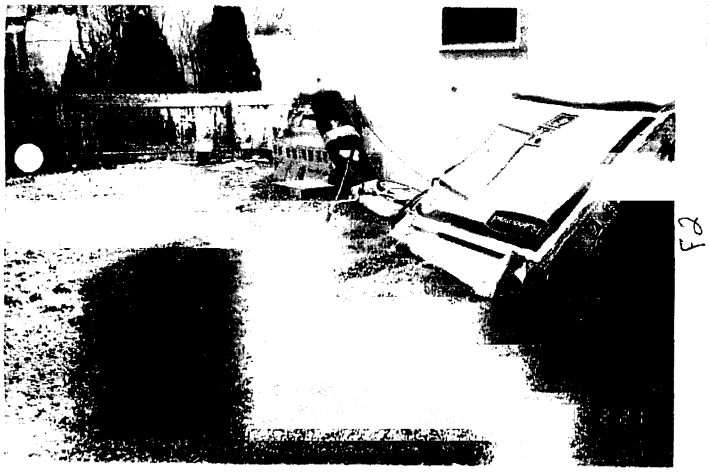
6. On December 12, 1996, the Complaint was filed.

7. February 21, 1997, photographs of defendants' backyard.

   a. Photographs demonstrate that the 15-day Notice has been fully complied with.

   b. All items shown in the previous photographs have either been stored in the shed or covered with a tarp, as per manager consent.

   c. The "rubbermaid" package is a second shed purchased by defendants (yet to be assembled) to store additional items.



F2

F3

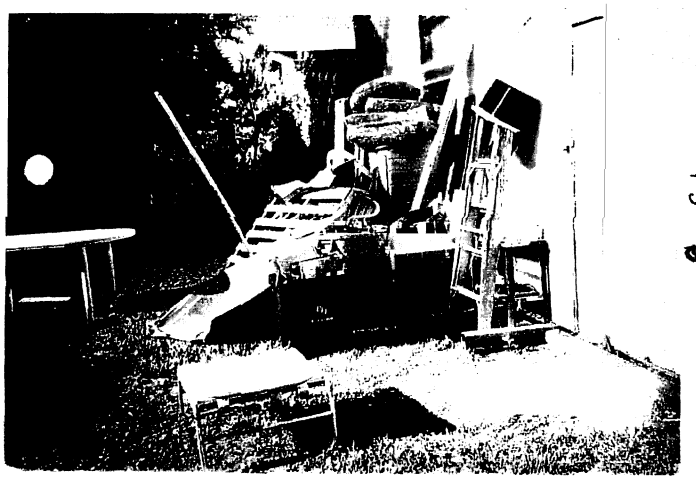
F4

8. May 12, 1997, photographs of defendants' backyard.

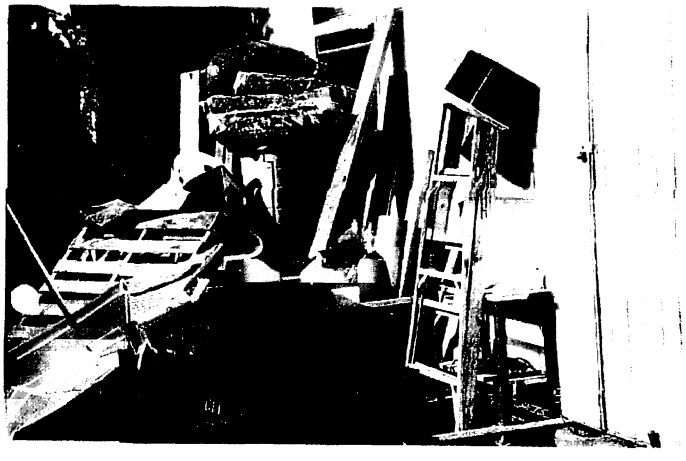
   a. Defendants were spring cleaning and had emptied the shed.

   b. The contents of the shed were out at most 1-2 days while the shed was cleaned and items organized.

   c. Plaintiffs use these photographs to show "continuing violations" deliberately misleads the court.



G1



G2

G3